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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 125 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH and  
MR.JUSTICE A.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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RAJA @ SURESH S KODWANI

Versus

STATE OF GUJARAT

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Appearance:

MR KJ SHETHNA for Petitioner  
MR SP DAVE, APP for Respondent No. 1

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CORAM : MR.JUSTICE M.S.PARIKH and  
MR.JUSTICE A.K.TRIVEDI  
Date of decision: 23/03/99

ORAL JUDGEMENT [Per M.S. Parikh, J.]

1. The appellant Raja alias Suresh Santramdas Kodwani, (hereinafter referred to as 'the accused') stood his trial for the offences punishable u/S. 302 of the Indian Penal Code and sec. 135 of the Bombay Police Act

on the allegation that on 26/1/1988, at about 6.15 p.m. he assaulted deceased Pratapbhai Kundanbhai Kodwani at Royal Bakery with a poker, which he was having with him in violation of certain prohibitory orders issued by the Competent Police Authority and caused grievous hurt resulting into death of aforesaid Pratapbhai Kundanbhai Kodwani within a short time. He was tried accordingly before the learned Sessions Judge, Vadodara in Sessions Case No. 153 of 1988. At the conclusion of trial he was held guilty of having committed offence punishable u/S. 302 of the Indian Penal Code, but was acquitted of the offence punishable u/S. 135 of the Bombay Police Act. He was accordingly sentenced to undergo imprisonment for life by impugned judgment dated 16/1/1990 rendered by the learned Sessions Judge Vadodara in the aforesaid Sessions Case.

2. The prosecution case in the aforesaid Sessions Case is that the accused happens to be cousin of deceased Pratapbhai Kodwani and their respective fathers are the real brothers. Santramdas Kodwani, father of the accused used to reside at Ramkrishna Blocks in the city of Vadodara and he used to run a hotel in the name and style of 'Larilappa Hotel' on the ground floor thereof. There were two cabins outside the hotel, in one of which deceased Pratapbhai Kodwani used to run a Pan-Bidi shop. The accused did not like deceased running the Pan-Bidi shop and there appeared to be some disputes in that regard. Santramdas Kodwani, however, sold the hotel alongwith the Pan-Bidi cabin and deceased Pratapbhai Kodwani started business in the name of Royal Bakery in partnership with one Daulatram Rohra, who happens to be husband of his sister. Royal Bakery has been situated at shed no. E-25, at Sardar Industrial Estate on road no. 2. The accused Raja also started his bakery business in the name of Sony Bakery on road no. 3 at Sardar Industrial Estate. At about 6.00 p.m. on 26/1/1988 complainant Daulatram Rohra had gone to his bakery (Royal Bakery), when the workers were also at work there; meanwhile deceased Pratapbhai Kodwani and the accused Raja Kodwani reached there and were sitting in the office of the Royal Bakery. Daulatram Rohra had gone inside the bakery to have a round, but he soon heard Pratapbhai Kodwani raising his shouts for help. He, therefore, came out and saw Pratapbhai Kodwani, since deceased, running towards the bakery being chased by the accused having the poker in his right hand (poker, described as Soya used for breaking ice). The complainant saw the garments of the deceased stained with blood. Seeing the accused chasing the deceased, Daulatram Rohra caught hold of the accused and at that time the poker had fallen down. The

deceased had fallen down in gravely injured condition. The accused had escaped from the scene of offence on his scooter. The complainant had gone to Sony Bakery and informed the elder brother of the accused, Nandubhai Kodwani by name. Nandubhai Kodwani, therefore, went in a three wheeler tempo to the scene of offence. The deceased was then removed to the S.S.G. Hospital, Vadodara, but he was reported dead. The complainant had gone to his in-laws house and was waiting there. The head constable on duty at the S.S.G. Hospital, Vadodara gave message to the police station authority saying that one unknown assailant had injured the person who was dead. The police rushed to the S.S.G. Hospital, Vadodara, but finding no-one there, went to the house of the deceased and formal complaint of Daulatram Rohra was recorded. The offence against the accused was accordingly registered and the Panchnama of scene of offence was drawn up. Muddamal poker was also recovered. The garments on the dead body were recovered therefrom and were forwarded for examination. After receipt of P.M. Report and other necessary reports from the Forensic Science Laboratory, charge-sheet was submitted and the case was committed to the Sessions Court. As stated above, the learned Sessions Judge recorded conviction and sentence upon conclusion of trial. That is how the appellant is before this Court.

3. At the trial prosecution relied upon following oral evidence :-

- i. P.W. 1 Exh. 13 Dr. Uday Rameshchandra Purandara, Medical witness.
- ii. P.W. 2 Exh. 15 Complainant Daulatram Chandandas Rohra
- iii. P.W. 3 Exh. 16 Jamalahmed Mohmed Ibrahim, servant of the deceased.
- iv. P.W. 4 Exh. 17 Kanaiyalal Girdharbhai, servant of the deceased.
- v. P.W. 5 Exh. 18 Mohmed Farid Ibrahimbhai, servant of the deceased.
- vi. P.W. 6 Exh. 19 Bhaskarbhai Dashrathbhai, servant of the deceased.
- vii. P.W. 7 Exh. 20 Nandubhai Santramdas, brother of the accused and cousin of the deceased.
- viii. P.W. 8 Exh. 21 Ashok Kundandas, brother of the deceased.
- ix. P.W. 9 Exh. 25 P.S.I. Jaidevsinh Jitendrasinh Solanki, Investigating Officer.

Prosecution also placed on record following material in the form of documentary evidence :-

- i. Exh. 3 Muddamal list
- ii. Exh. 11 map regarding scene of occurrence.
- iii. Exh. 12/1 complaint lodged by Daulatram Rohra.
- iv. Exh. 14 P.M. report
- v. Exhs. 12 to 14 reports of F.S.L.

Following Panchnamas have also been placed on record :-

- i. Exh. 6 scene of offence Panchnama
- ii. Exh. 7 inquest Panchnama
- iii. Exh. 8 Panchnama regarding blood stain clothes of the deceased.
- iv. Exh. 9 arrest Panchnama
- v. Panchnama regarding search of the house of the accused.

4. Learned Sessions Judge upon appreciation of evidence found that following circumstances were established by the prosecution beyond reasonable doubt and even if the circumstances nos. 11 and 13, namely, the poker was recovered from the spot and that Nandubhai Kodwani, the real brother of the accused, who had taken the deceased to the hospital had intentionally given false information to the hospital duty police that the assailant was unknown man were not established by the prosecution beyond reasonable doubt, the conclusion that the guilt of the accused was brought home beyond reasonable doubt would remain the same.

- i. Accused Raja alias Suresh Santramdas Kodwani and the deceased Pratap Kundandas Kodwani were cousin and they in past had a dispute regarding the Pan-Bidi cabin.
- ii. On 26/1/88, at about 6.00 p.m. the accused and the deceased were in the office of Royal Bakery situated at Sardar Industrial Estate, Vadodara,
- iii. That on that day at about 6.15 p.m. the deceased was found to be running towards bakery portion from the office in injured condition.
- iv. That the accused was found running after the deceased with a poker i.e. "Soya" in his right hand.
- v. That Daulatram Rohra had caught hold of the accused from behind and the poker in the right hand of the accused had fallen down.
- vi. That the deceased had fallen down while the accused had escaped therefrom on his scooter.
- vii. That the deceased had the injuries on the chest and the back.

- viii. That the abovesaid injuries were possible by the poker i.e. Soya.
- ix. That the bush-shirt and the Banian were having the cut marks which could have been caused by the poker.
- x. That the deceased had died homicidal death because of the injuries which could have been caused by the poker.
- xi. That the poker was recovered from the spot.
- xii. That the poker was stained with human blood of "B" group i.e. the blood group of the deceased.
- xiii. That Nandubhai Kodwani, the real brother of the accused who had taken the deceased to the Hospital had intentionally given false information to the Hospital Duty Police that the assailant was an unknown man.

The learned Sessions Judge has, however, come to the conclusion that the prosecution failed to establish guilt of the accused u/S. 135 of the Bombay Police Act with regard to Muddamal poker and, therefore, he acquitted the accused of the offence punishable under that provision.

5. We have heard the learned advocate for the appellant and Ld. A.P.P. for the State. Both of them have taken us through the prosecution evidence and the impugned judgment.

6. It has been submitted on behalf of the accused that the identity of the accused as connecting him with the homicidal death of Pratap Kodwani has not been established beyond reasonable doubt and upon appreciation of evidence, the conduct of the complainant Daulatram Rohra cannot be said to be above board. It has been submitted that even though he had been an eye witness to the incident as aforesaid, he neither proceeded to have the complaint/F.I.R. recorded nor rushed the injured Pratapbhai to the hospital. Instead he went to his in-laws' house. This conduct on the part of the complainant has been pressed into service for submitting that the prosecution has failed to establish the guilt of the accused beyond reasonable doubt. It is no-doubt true that F.I.R. that has been lodged by the real brother of the accused Nandubhai Santram Kodwani, who had been declared hostile (P.W. 7 Exh. 20) indicates that information to the effect that one person Pratap Kundanbhai Kodwani by name was injured on his chest and abdomen with some sharp weapon by some person and he has been brought in dead condition by one Nandubhai Santramdas Kodwani in S.S.G. Hospital. In this

connection, reference has been made to the evidence of Investigating Officer P.W. 9 Jaidevsinh Jitendrasinh Solanki Exh. 25. It is also no-doubt true that such an information was first in point of time received by the Investigating Officer. However, Nandubhai Kodwani, who happens to be real brother of the accused and who had taken the deceased to the hospital had failed to give to the police information regarding identity of the assailant. In fact, he was also informed by the complainant about the accused, his real brother having caused injuries to the deceased. Dealing with this part of the evidence as emanating from the evidence of the Investigating Officer as well as evidence of Nandubhai Santramdas Kodwani and other witnesses, the learned Sessions Judge has come to the conclusion that Nandubhai was interested in giving such a false information. We may state that being the brother he was interested in seeing that information as he knew was not given. At the same time he has clearly omitted to state the fact which he was informed regarding his brother (the accused) having caused the injuries to the deceased. It, therefore, clearly appears that the deceased was taken to the hospital by none else than the real brother of the accused, namely P.W. 7 Exh. 20 Nandubhai Santramdas Kodwani. Therefore, if complainant Daulatram Rohra was in any way shaping in the incident of causing injuries to deceased Pratapbhai some suspicion would have surfaced at the initial stage itself. That apart, the learned Sessions Judge has carefully dealt with the evidence of all the witnesses, some of whom are the independent witnesses and has come to the conclusion that rest of the circumstances have been established by the prosecution without there being any doubt concerning such circumstances. We need not repeat the discussion of the evidence as the same would run parallel to what the learned Sessions Judge has done. We endorse the view of the learned Sessions Judge that although there is no eye witness to the actual assault, the prosecution case standing on the aforesaid circumstances has clearly been established beyond reasonable doubt, supported by the documentary evidence in the form of P.M. report, F.S.L. reports and the Muddamal poker also found with blood of the same group as that of the deceased.

7. It has, however, been submitted on behalf of the accused that there were no blood stains or blood marks found at the scene of occurrence, which can be seen from the Panchnama as well as the map respectively Exhs. 6 and 11. It is true that no blood mark has been found from the scene of occurrence, but it has constantly been stated by the prosecution witnesses that Pratapbhai,

since deceased, had fallen down as facing the sky. Besides, the poker having dia-meter of 0.5 cms. and the wounds being the punctured wounds, it was possible that the blood might not have oozed out so as to leave blood marks on the floor. It might be noted that the clothes of the deceased were found stained with blood as well as cuts showing puncture of the poker. Therefore, simply because the place of occurrence does not show blood marks, it cannot be held that the prosecution has failed to prove the guilt of the accused beyond reasonable doubt.

8. It has finally been submitted that the background in which the incident has occurred would indicate that there was no enmity or there were no differences left out between the deceased and the accused at the time when the incident occurred. The Pan-Bidi shop in respect of which differences were alleged between the deceased and the accused, was long back handed over back to the father of the accused leaving no disputes or differences between the accused and the deceased at the time when the incident had taken place. Simply because the prosecution has failed to prove motive, it cannot be found that the prosecution has failed to establish its case beyond reasonable doubt. On the contrary, the evidence which has been discussed at length by the learned Sessions Judge has pointed at the accused and none else. In that view of the matter, we are unable to accept submissions made on behalf of the accused so far as the guilt of the accused is concerned.

9. It has, however, to be ascertained whether the prosecution has successfully established guilt of the accused as referable to section 302 of the Indian Penal Code. Even the learned Sessions Judge has fairly concluded that there has been no eye witness to the actual assault and the prosecution case rests upon certain circumstances. Besides, it has positively been brought on record that the differences and/or disputes between the accused and the deceased regarding the Pan-Bidi shop as stated above, did not survive as the shop had been handed over to the father of the accused long back. This is one circumstance which has to be borne in mind while dealing with what is the nature of offence which has been brought home by the prosecution. It has been submitted by Mr. S.P. Dave, Ld. A.P.P. that P.W. 3 Exh. 16 Jamal Ahmed Mohamed Sidikki has in terms deposed that for the work of baking poker is used for breaking ice which in turn is required in the process of baking of one/some of the items of bakery, but at the relevant point of time there was no poker in Royal

Bakery. Now this part of the evidence has been shown from the cross-examination of the witness. It is, however, not the prosecution case that accused brought with him poker. In fact both the prosecution case as well as prosecution evidence have remained silent about accused having brought with him the poker. Prosecution has, as a matter of fact, tried to infer accused having brought poker with him from the circumstance that he was also having his bakery in the name and style of Sony Bakery. Under such circumstances, it cannot be said to have been established, much less beyond reasonable doubt, that there was no poker at the actual place of occurrence in the Royal Bakery. Possibility of there being a poker where the accused and deceased might have had some exchange/altercation resulting in the assault by the accused upon the deceased cannot be ruled out. Under the circumstances noted from the prosecution case it has been abundantly made clear that the accused and the deceased had come to the Royal Bakery on their respective scooters and when they reached the office of Royal Bakery, there was no indication about there being any heated exchange or excitement between the two. Even the complainant Daulatbhai Kodwani has not spoken to such an occurrence between the accused and the deceased when they reached Royal Bakery. Something did happen either inside the office of Royal Bakery or some place there around. Prosecution is absolutely silent about the same. It is, therefore, obvious that the genesis of the offence is in dark. There is every possibility of poker being within the reach of either of the two. It is, therefore, clear as day light that there was no premeditation or preparation or prior intention on the part of the accused to steal the life of the deceased. It is under such circumstances that Mr. Shethna, learned advocate for the accused vehemently submitted that at best the offence punishable u/S. 304 Part II of the Indian Penal Code can be said to have been established. In our considered opinion, bearing in mind the fact that indisputably the accused chased the deceased and was prevented by the complainant Daulatbhai Rohra from giving any further blows to the deceased, we have no hesitation in holding that the prosecution has succeeded in establishing the offence attributable to the accused u/S. 304 Part I of the Indian Penal Code. To that extent the present case is distinguishable from the decision in the case of State of Karnataka v. Siddappa Basanagouda Patil reported in AIR 1990 S.C. p. 1047 relied upon Mr. Shethna for the accused for applying Sec. 304 part-II of the I.P.C. However, we are fortified in our conclusion that the case is not covered by section 302 of the Indian Penal Code, even from this decision where the Apex Court has observed



that where there is suppression of genesis and origin of the occurrence, accused would be liable to conviction u/S. 304 and not u/S. 302. In the present case it has been established beyond reasonable doubt that the accused was chasing Pratapbhai who was already assaulted and injured by him with the poker in his right hand and was intercepted and prevented by the complainant in causing further injuries. Besides, there are number of blows of poker which can be noticed from the P.M. report. Thus the case would attract application of Sec. 304 part-I and not Part-II. The injuries which have been revealed from the P.M. report are :

1. There was a small stab wound measuring 0.5 x 0.5 cm on the chest just below the neck on the right side.
2. There was a stab wound measuring 0.5 x 0.5 cm under the nipple on the right side.
3. Stab wound measuring 0.5 x 0.5 cm in the axillary region posteriorly on the right side.
4. There was a CLW over temporal and near right cheek measuring 4 cm on the right side.
5. There was a stab wound measuring 0.5 x 0.5 cm in the axillary region on the left side.
7. There was a stab wound measuring 0.5 x 0.5 cm in the left iliac region.
8. There was a stab wound measuring 0.5 x 0.5 cm just below injury no. 2 on the right side.
9. On the back there were three stab wounds each measuring 0.5 x 0.5 cm.
  - (a) under the neck
  - (b) left side lumber region
  - (c) over the left shoulder.

On internal examination following injuries were also noticed :-

1. 200 ML of blood was found in the right pleural cavity.
2. There was a tear in the right lung.
3. 50 ML of blood was noticed in the left pleural cavity alongwith the tear in the left lung.
4. 75 ML of blood was noticed in the paricardial cavity.
5. There was injury to the heart at the base

of the palmonary artery and the right atriom.

10. Thus, in view of the circumstances noted above and in view of the nature of weapon, which might have accidentally reached the hands of the accused at the place of the occurrence, we find that the present case is covered u/S. 304 Part I of the Indian Penal Code. We would also be supported in our conclusion, by the decision in the case of Surinder Kumar v. Union Territory, Chandigarh, reported in AIR 1989 S.C. p. 1094, where it has been observed that when a person in the heat of moment picks up a weapon, which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of exception 4 to section 300 and can be convicted u/S. 304 Part-I of the Indian Penal Code. It has been observed by the Apex Court that number of wounds caused during the occurrence is not a decisive factor, but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger.

11. In view of what is stated above, number of injuries and the fact of chasing would not be guiding criteria in the facts and circumstances noted above for applying section 302 of the Indian Penal Code.

12. In the result, the conviction of the accused rendered by the learned Sessions Judge u/S. 302 of the Indian Penal Code is hereby altered to one u/S. 304 Part-I of the Indian Penal Code.

13. We have heard the learned advocate for the accused and Ld. A.P.P. on the question of sentence. The facts and circumstances under which the incident occurred have to be kept present before the mental eyes while dealing with the question of sentence. The offence punishable u/S. 304 Part-I of the Indian Penal Code leaves the Court with a discretion of imposing either life sentence or sentence which may extend to 10 years of rigorous imprisonment. It is not in dispute that the accused has already undergone actual sentence to the extent of more than 9 years. We have verified that fact from the particulars made available. If the remission which is already granted by the State Government is added, the accused must be treated as having undergone sentence of more than 10 to 11 years. Besides, we also propose to impose sentence of fine as per the provision contained in section 304 Part-I of the Indian Penal Code. It would, therefore, be in the interest of justice to

pass following order of sentence :-

The sentence of life imprisonment imposed by the learned Sessions Judge as per the impugned judgment is hereby altered to sentence of imprisonment already undergone. However, the accused is, in addition, directed to pay fine of Rs.5,000/- (Rupees five thousand only). Request of Mr. Shethna to pay/deposit the fine in the trial Court within one month from today is hereby granted. In case the accused fails to pay fine as aforesaid, he shall undergo default sentence of rigorous imprisonment for a period of one year.

If the accused is not required for any other case, he shall be set at liberty forthwith in view of above sentence.

This appeal is partly allowed in the aforesaid terms.

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PVR.